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Legal Guide U-1

RULES FOR PROMOTIONAL GIVEAWAYS (California Business and Professions Code sections 17533.8, 17537.1.) August, 1995

1. Intent to Make a Sales Presentation

Any person who offers a gift or prize to a prospective recipient by any means, with the intent to make a sales presentation, must clearly and unequivocally disclose that intent at the time the offer is made. This requirement does not apply to a publisher or broadcaster, who in good faith and without knowledge publishes or broadcasts an advertisement which does not comply with this requirement. (Bus. & Prof. Code, ' 17533.8.)

2.Intent to Induce Attendance at Sales Presentation (Bus. & Prof. Code, ' ' 17537.1, 17537.2, 17537.4.)

a. Definitions

- (1) "Incentive" means any item or service of value, including but not limited to any prize, gift, money, or other tangible property. (Bus. & Prof. Code, ' 17537.1(a).)
- (2) "Person" includes the offeror, and an employee, agent, or independent contractor employed or authorized by the offeror. (Bus. & Prof. Code, ' 17537.1(a).)

b. Disclosures Required

Any person who, as part of an advertising program, offers an incentive to a recipient to induce the recipient to attend a sales presentation, contact a sales agent, or visit a location, must disclose the following, in writing, in the offer -- clearly, conspicuously, and intelligibly:

(1) On the Front or First Page

- The name and street address of the owner of the property or the provider of services being offered, as

well as a general description of the owner's or provider's business.

- The purpose of the requested visit, sales presentation, or contact with a sales agent, including a general description of the property or services that will be offered for sale. If there will be a sales presentation, this must be disclosed clearly, together with the approximate duration of the visit and presentation.
- A clear statement of the odds of receiving each incentive offered, or a clear statement describing where the odds can be found in the offer, if the recipient is not assured of receiving any particular incentive.
- If applicable, a clear statement that the offer is subject to specific restrictions and qualifications, and a statement describing where the restrictions and qualifications can be found in the offer. (Bus. & Prof. Code, ' 17537.1(a)(1).)

(2)Elsewhere in the Offer

- A clear statement of the odds of receiving each incentive offered, unless disclosed on the front or first page.
- Any deadline which the recipient must observe in order to receive the incentive, and any other applicable restrictions, conditions or qualifications (e.g., age, financial status, spouse's attendance).
- A statement that the recipient of an incentive may request, and will, upon such request, be given, evidence which shows that the incentive matches the incentive which was randomly (or otherwise) selected for that recipient.

- A statement that the right to provide a "raincheck" or a substitute or like item is reserved, if that right is reserved.
- All other rules, terms and conditions of the offer, plan or program. (Bus. & Prof. Code, ' 17537.1(a)(2).) (See section 17537.1(a) for additional details on the required disclosures.)

c. Coverage of Disclosure Requirements

The foregoing requirements apply even if the initial offer of the incentive is not made in writing. In such a case, the recipient must receive the required disclosures in writing before any scheduled visit or contact. Also, the disclosures must be made whether the recipient's contact with a sales agent or attendance at a sales presentation is to be by mail, by telephone, or in person. (Bus. & Prof. Code, ' 17537.1(a).)

d. Misrepresentations Prohibited

The offeror cannot misrepresent the offer, plan, or program in any manner. Business and Professions Code section 17537.1 specifically prohibits:

- Misrepresenting that the offer originates from, or is issued by or on behalf of, a government agency, a credit reporting agency, a law office, or the like.
- Misrepresenting the incentive, or misrepresenting in any manner the odds of receiving any particular incentive.
- Misrepresenting that the number of participants has been significantly limited, or that the recipient has been selected to receive a particular incentive.
- Misrepresenting the affiliation or relationship between the offeror and the owner of the property or the provider of services.
- Labeling any offer a notice of termination or cancellation. (Bus. & Prof. Code, ' 17537.1(g).)
- Making the offer if the offeror knows, or has reason to know, that the offered item will not be available in sufficient quantity based on the reasonably anticipated response to the offer. (Bus. & Prof. Code, ' 17537.1(b).)

e. Incentive Must be Awarded

Once the recipient of the offer has responded to it in the manner specified, and has met the prescribed requirements and qualifications, the offeror must provide the offered incentive, unless the incentive is not reasonably available and the right to provide a raincheck or substitute or like incentive has been reserved in the written offer.

If the offered incentive is unavailable for reasons not reasonably foreseeable or controllable by the offeror, the offeror must inform the recipient of his or her right to receive a raincheck (unless the offeror knows that the item will not be available). The offeror also must inform the recipient that he or she has the additional option of receiving a like or substitute incentive of equivalent or greater retail value, or a raincheck for that incentive. (Bus. & Prof. Code, ' 17537.1(c),(d).) (See ' 17537.1(e) for requirements on delivery of rainchecked incentives.)

f. Awards Must be Verified Upon Request; Retention of Records

Upon request by a recipient who has received, or who claims a right to receive, any offered incentive, the offeror must provide the recipient with sufficient evidence showing that the incentive actually provided matches the incentive that was randomly or otherwise selected for distribution to that recipient. (Bus. & Prof. Code, ' 17537.1(f).)

If the major incentives are awarded or given at random by the assignment of a number to the items, that number must actually be assigned by the party contractually responsible for doing so. The offeror must maintain contest records for one year after the date the offer was made. (Bus. & Prof. Code, ' 17537.1(h).)

g. Specific Marketing Practices Prohibited

Business and Professions Code section 17537.2 declares the following specific marketing practices to be deceptive and to constitute unfair trade practices:

- Requesting the recipient to pay any money, for any purpose, to any person named or referred to in the

offer, in order to "utilize" the incentive. (Bus. & Prof. Code, ' 17537.2(a).)

However, if specified statutory criteria are met, an exception is allowed for refundable deposits of \$50 or less (plus tax), to reserve space availability or admission in connection with coupons or certificates which are redeemable for transportation, accommodations, recreation, vacation, entertainment, or like services. (Id.)

An exemption also is allowed if the incentive is a discount on hotel or other resort accommodation and if: the fee and any requirement to attend a sales presentation are clearly and conspicuously disclosed near the description of the incentive; the accommodation is within a 20-mile radius of the property on which the accommodations offered for sale are located (unless the accommodations offered for sale are managed and operated by the same person as, an affiliate of, or a franchisee of the manager and operator of the accommodation to be occupied, and one of the managers/operators is listed on a national stock exchange); and, the recipient is informed, in language substantially similar to that in the statute, that he or she is responsible for any applicable government-imposed taxes and any personal expenses incurred. The latter statement must appear in close proximity to the description of the offered incentive.

If the incentive is offered in connection with other incentives, such offer must comply with the requirements at 2.a-f., above. In addition, these other incentives must be typically and customarily included in a vacation package (e.g., transportation or entertainment), and the fee and any additional requirements to use the additional incentives must be clearly and conspicuously disclosed near the description of the offer. (Bus. & Prof. Code, ' 17537.2 (f).)

- Describing the incentive in an untrue or misleading manner, including: misleading the recipient as to the fair market value or the nature of the incentive; associating the recipient's name with a specific incentive unless the recipient's odds of receiving that incentive are clearly disclosed near the recipient's name; and, misrepresenting that the recipient may receive an incentive of greater retail value than that

of another named incentive (in this context, it is assumed that incentives are listed in descending or ascending order of value unless this assumption is clearly negated). (Bus. & Prof. Code, ' 17537.2(d), (e).)

- Stating or implying in the offer that the recipient is one of a selected group to receive a particular incentive (e.g., "You are a finalist"), without clearly disclosing near the statement or implication either the total number of persons in that group or the odds of receiving that incentive. (Bus. & Prof. Code, ' 17537.2(b).)
- Stating or implying in the offer that the recipient is likely to receive an offered incentive because other named people have received other specified incentives, without clearly disclosing near the statement the recipient's odds of receiving that incentive. (Bus. & Prof. Code, ' 17537.2(c).)

h. Sanctions and Remedies for Violations

An offeror who violates any of the foregoing provisions is guilty of a misdemeanor. (Bus. & Prof. Code, ' 17534.) The provisions described in these sections are also enforceable civilly by the Attorney General, district attorneys, city attorneys, and some agencies of the state. Remedies include civil penalties of up to \$2,500 for each violation, injunction, and restitution. (Bus. & Prof. Code, ' 17535, 17536.)

Violation of these provisions may also subject the offeror to an additional civil penalty of up to \$2,500 for each violation as an unlawful business practice. (Bus. & Prof. Code, ' 17200, 17206.) If the recipient of an offer which is subject to Business and Professions Code section 17537.1 (2.a.-2.g., above) is damaged by a violation of the provisions described at 2.-e.g, above, the recipient may bring a civil action for treble damages against the offeror. The court in such an action may award attorney's fees to the prevailing party. (Bus. & Prof. Code, ' 17537.4.) Private parties may also enforce the provisions described in 1. and 2.a.-2.g., above, in an action for injunction and other equitable relief under Business and Professions Code sections 17535, 17200, 17203 and 17204.

Prepared by:

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NOTICE TO READER

The Department of Consumer Affairs strives to make its legal guides accurate in every respect. However, this legal guide is only a guideline, and is not a definitive statement of the law. Questions about the law's application to specific circumstances should be directed to an attorney.

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